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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MARTHA ANN LYNCH PORTER, *et al., Petitioners,*

v.

BERT A. LYNCH, JR., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners Martha Ann Lynch Porter, Robert A. Porter, Louis Lynch, and Dora A. Lynch respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 3, 1971.

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Arkansas and of the Court of Appeals appear in the Appendix hereto. They have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1971. This petition for certiorari was filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the District Court abused its discretion in declining to adjudicate a claim for removal of a testamentary trustee, where

(a) the trustee had been appointed by a state court;

(b) a suit then pending in the same state court involved the same parties and the same requested relief; and

(c) only questions of state law were involved.

STATEMENT OF THE CASE

This case presents an important question with respect to the relationship between federal and state courts. The opinion of the Court of Appeals attempts to redefine this relationship in a way that conflicts with traditional teachings of this Court.

The underlying dispute involves the administration of family trusts created by the will of B. A. Lynch, deceased. The plaintiff (respondent here) is Bert A. Lynch, Jr., son of the testator. Defendants (petitioners here) are Dora A. Lynch, widow of the testator, Martha Ann Lynch Porter and Louis Lynch, his other two children, and Robert A. Porter, husband of Martha Ann Lynch Porter. The will, which was admitted to probate on December 16, 1963, by the Probate Court of Mississippi County, Arkansas, Chickasawba District,

created two trusts, one known as the marital-deduction trust and the other as the residuary trust (Complaint, p. 2).[1] As a beneficiary of the residuary trust, respondent has a 14 per cent interest in the assets that were included in his father's estate. He is also a contingent beneficiary of the marital-deduction trust. Petitioners, except for Mr. Porter, beneficially own all remaining property interests in the two trusts (Complaint, pp. 2-3). The will granted to the trustees the same rights over the trust property as the decedent would have if living (Codicil ¶ VII, pp. 2-3, Exhibit B to Complaint).

Respondent Bert A. Lynch, Jr., and petitioner Dora A. Lynch were named trustees of both trusts by the will. After a time, a disagreement arose between them concerning the administration of the trust assets, revolving primarily around differing attitudes towards the trusts' large investments in stock of the Farmers' Bank & Trust Company of Blytheville, Arkansas (of which the testator, Mr. Lynch, was president, and the petitioner Robert A. Porter is now president) and in real estate in downtown Blytheville. The two trustees were unable to resolve the deadlock, and the petitioners Dora A. Lynch and Martha Porter filed a petition with the Chancery Court of Mississippi County, Arkansas, Chickasawba District, sitting in Blytheville, seeking either an increase in the number of trustees or binding instructions from the Chancellor. This proceeding, styled *In the Matter of the Testamentary Trust of B. A. Lynch, Deceased,* No. 17,542-A, was instituted on February 27, 1968. The dispute was resolved, for the time being, on May 17, 1968, by an order of the Chancery Court to which all parties (the same persons

[1] The case was decided by the Court of Appeals on the original record, without uniform pagination.

who are now before this Court) agreed. Respondent resigned as trustee, and petitioner Martha Porter was appointed substitute co-trustee to serve with her mother.

On April 13, 1970, respondent filed the instant suit in the District Court. The two trustees, Mrs. Lynch and Mrs. Porter, Mr. Porter, and Louis Lynch were named defendants. The complaint contained two separate counts. Count I was based upon the District Court's diversity jurisdiction (Complaint, p. 2). It alleged, as noted above, that "[o]n May 17, 1968, defendant Martha Ann Lynch Porter became a successor co-trustee of the Marital Trust and Residuary Trust and from said date has continued to act as such together with one Dora Lynch, the widow of the Decedent" (Complaint, p. 3). Count I went on to allege a breach of trust on account of certain transactions between the trust and Mr. Porter. Damages were demanded in the amount of $49,199.63, plus interest, to be paid to the trusts.

Count II alleged (Complaint, p. 5) that "[t]his Court has jurisdiction over this action in Count II hereof pursuant to this Court's pendent jurisdiction . . . . " Equitable relief was sought in the form of removal of Mrs. Porter as trustee, substitution of respondent in her stead, and attorney's fees. Substitution of respondent as successor trustee was said to be authorized (in the event of Mrs. Porter's ceasing to serve) by the May 17, 1968, Chancery Court order (Complaint, p. 6).

Issue was never joined on the merits of the complaint. No testimony was ever taken, either in court or by way of discovery. A number of motions, briefs, and

other pleadings were filed. On September 30, 1970, petitioner Dora A. Lynch voluntarily paid to the trusts the $49,199.63 demanded by Count I, plus interest at the legal rate, for a total payment of $52,442.92. No liability or wrongdoing was admitted. Petitioners moved to dismiss Count I as moot and asked the District Court not to proceed with the pendent claim stated by Count II. The latter claim (for removal of Mrs. Porter as trustee), they argued, should be determined by the state Chancery Court, which then had pending before it, in the above-cited proceeding, *In the Matter of the Testamentary Trust of B. A. Lynch, Deceased,* No. 17,542-A, a petition by the trustees, filed on June 24, 1970, for approval of their accounts.

The District Court sustained defendants' position by memorandum opinion dated January 27, 1971. The Court held "that count I has become moot and must be dismissed" (p. 7a). The Court went on to say that "even with the dismissal of count I for mootness, it still would have jurisdiction over 'pendent' litigation and, under some circumstances, might justly proceed to determine the issues in such litigation" (p. 7a). In the instant case, however, the Court considered the relevant factors and determined, in the exercise of its discretion, to dismiss Count II, without prejudice. The District Court also indicated that it would have abstained from deciding Count II even if Count I had not dropped out of the case. A claim for removal and replacement of a testamentary trustee, it said, should more appropriately be decided by the state Chancery Court, with continuing supervisory jurisdiction over administration of the trust.

On appeal, the judgment was reversed. The Court of Appeals ordered the District Court to rule on the

claim for removal of a trustee. It held first that the case was not one of pendent jurisdiction. Despite respondent's invocation of that doctrine in the trial court (which, incidentally, respondent's counsel repudiated on appeal), the Court of Appeals held that the District Court should have treated the case as one involving the aggregation of claims to reach the jurisdictional amount, rather than one involving two separate claims, one of which was independently within federal jurisdiction, and the other of which was not. With regard to the question of discretionary abstention in respect of the claim for removal of a trustee, the Court of Appeals agreed "with the district court's apt appraisal and preference to have the state Chancery Court administer the accounting," (p. 16a,) but nevertheless held that the District Court had abused its discretion in deferring to the state court's jurisdiction.

REASONS FOR GRANTING THE WRIT

Whatever the number of courts and whatever the doctrinal rubric under which this case is considered, the ultimate issue comes down to this: the only claim still pending in the federal court asks that a trustee appointed by a state court be removed. Assuming that the federal court has jurisdiction, in the strict sense, to decide this claim, was it an abuse of discretion to decline to proceed to decision? The nature of the claim and the history of this proceeding alike require a negative answer to this question.

The field of federal-state court relationships is indeed a delicate one, and the federal courts have traditionally exercised their discretion to avoid irritations in this area by unnecessary interference with state proceedings. This is so even where the suit is *quasi in rem* and

the federal court's jurisdiction has first attached. As this Court said in *United States* v. *Bank of New York and Trust Co.*, 296 U.S. 463, 480 (1936):

> Even where the district court has acquired jurisdiction prior to state proceedings, the character and adequacy of the latter proceedings in relation to the administration of assets within the state, and the status of those assets, may require in the proper exercise of the discretion of the federal court that jurisdiction should be relinquished in favor of the state administration. *Pennsylvania* v. *Williams*, 294 U.S. 176, 185; *Gordon* v. *Ominsky*, 294 U.S. 186, 188 . . . .

The history of the instant controversy will demonstrate that this principle is peculiarly applicable here. The trusts that are the subject of this suit are both creatures of the Will of B. A. Lynch. That instrument derives all its vitality from an order of the Probate Court of Mississippi County, Arkansas, Chickasawba District, in cause number 4061 (see paragraph 5 of count I of the Complaint). Later, when a dispute arose concerning the administration of the trusts, it was submitted to and settled by the Chancery Court of Mississippi County, Arkansas, Chickasawba District.[2] The order of that Court actually appoints the petitioner Martha Ann Lynch Porter as one of the trustees. Yet, instead of returning to the Chancery Court, which is familiar with the trusts and the parties and is the Court of primary supervision of the trusts, respondent sued in the federal forum. He asked the District Court to remove one of the trustees—the one, as it happens, who was recently appointed by the state court. A greater

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[2] Under Arkansas law, the same person is both Probate and Chancery Judge.

interference with, and assumption of jurisdiction over, a trust primarily under the supervision of another court, could scarcely be conceived. Compare *Urbano* v. *Board of Managers of the New Jersey State Prison,* 415 F. 2d 247, 258 n. 27 (3d Cir. 1969) (dictum referring to the "generally-accepted principle of lack of jurisdiction by the federal courts over the administration of testamentary trusts. . . .") *Martz* v. *Braun,* 266 F. Supp. 134 (E.D. Pa. 1967); 5 Scott, *Trusts* § 570, at p. 3812 (3d ed. 1967).

As Professor Scott remarks at Section 569, page 3811: "Even though a court has jurisdiction, it may decline to exercise it on the ground that the exercise of jurisdiction should be left to another court." As noted, this suit deals with the administration of testamentary trusts, a subject primarily within the competence and expertise of the Probate and Chancery Courts of Arkansas. The Chancery Court has already spent considerable time studying the facts out of which this suit arises. A portion of the stipulation approved by that Court (Exhibit D to the Complaint) is at issue in this suit, and the state court is obviously in a much better position to construe and apply its own decree. Respondent asks the federal courts to remove an officer heretofore appointed by the state court, which appointment he expressly approved. The situation is analogous to other cases in which federal courts, although technically possessing jurisdiction, have abstained in favor of state-court jurisdiction. *See, e.g., Pennsylvania* v. *Williams,* 294 U.S. 176, 185 (1935).

The relief requested by count II, removal of a state-court-appointed trustee, is the type of relief that federal courts, in the exercise of their discretion, have traditionally been reluctant to grant, especially where

the state courts are open and sitting to consider the very claim pressed upon the federal courts. (Here, respondent has filed a claim in the state court seeking removal of Mrs. Porter as trustee). Compare the long line of cases holding that federal courts do not exercise jurisdiction over the administration of decedents' estates, *e.g., Northrup* v. *Browne,* 204 Fed. 224, 230 (8th Cir. 1913). Whether to remove a trustee directly involves the administration of the trusts. Whether this Court, or the Court of Appeals, would as an original matter have abstained is not the issue. The question is whether the District Court abused its discretion, and principle and authority alike make clear that it did not.

With deference, the opinion of the court below fails to meet the issue fairly. It is perfectly true that, in general, the federal courts have a duty to exercise their jurisdiction, even though only state-law questions may arise. It is equally true that, in a number of recognized situations, those courts (including this Court) have abstained from exercising that jurisdiction. The state-court suit now pending was only a continuation of a dispute lodged in the state court long before institution of the instant federal suit. Which case came first, however, is not dispositive. *E.g., United States* v. *Bank of New York and Trust Co.,* 296 U.S. 463, *supra.* The point is that respondent's remaining claim goes directly to the administration of a testamentary trust presently under state-court supervision, rather than concerning merely a personal right to money or property.

Martz v. *Braun,* 266 F. Supp. 134, *supra,* on which the court below inexplicably relied, nicely illustrates this crucial distinction. That was an action by a beneficiary against trustees for money damages. The court

denied motions to dismiss for want of jurisdiction and to abstain from exercising jurisdiction, but in doing so indicated that its action would have been different had plaintiff been "seeking an accounting, or to have the trustees removed, or to have the trust corpus restored," 266 F. Supp. at 138. The suit before it, the court said, unlike a claim for removal of trustees, "does not call for our administration of the trust assets," *ibid.*, and "is far enough removed from direct interference with the trust itself so as to be within our power to adjudicate," *id.* at 139.

This Court should act to correct the encroachment by the court below on the District Court's legitimate exercise of discretion, and to restore the proper balance of jurisdiction and its exercise between state and federal courts.

CONCLUSION

The writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit. On plenary consideration, the judgment of the Court of Appeals should be reversed, and the cause remanded to that court with directions to affirm the judgment of the District Court.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

No. J-70-C-13

BERT A. LYNCH, JR., *Plaintiff*

v.

MARTHA ANN LYNCH PORTER, ROBERT A. PORTER, LOUIS LYNCH, DORA A. LYNCH, MARTHA ANN LYNCH PORTER and DORA A. LYNCH, Trustees of the Marital Trust and Residuary Trust established under the Last Will and Testament and First Codicil thereto of B. A. Lynch, deceased, *Defendants*

Memorandum Opinion

This memorandum will be filed by the Court with the clerk as the basis for its decision upon defendants' "Motion to Dismiss for Want of Jurisdiction of Subject-Matter and on Ground of Mootness," filed herein on October 2, 1970. To understand the issues, however, it will be best to analyze the case as it stood *prior* to the events referred to in the October 2 motion.

The complaint, filed herein on April 13, 1970, purports to set forth two causes of action in separate counts.

As originally filed, count I named the plaintiff's mother, Mrs. Dora A. Lynch, and plaintiff's sister and brother-in-law, Martha Ann Lynch Porter and Robert A. Porter, as defendants. The plaintiff is alleged to be a citizen and resident of Missouri and the three named defendants are alleged to be citizens and residents of Blytheville, Arkansas. Mrs. Porter and Mrs. Dora Lynch are named individually and as trustees of two trusts established under the will,

and codicil thereto, of B. A. Lynch, deceased. The complaint and the exhibits attached thereto indicate that Mr. B. A. Lynch died on December 13, 1963, leaving surviving him his widow, the defendant Mrs. Dora A. Lynch, and three children: the plaintiff, the defendant Mrs. Porter, and one Louis Lynch.

The first count of the complaint alleges that two trusts were established under B. A. Lynch's will and codicil, one known as the "Marital Deduction Trust" and the other known as the "Residuary Trust." The plaintiff alleges that he is a contingent beneficiary of the Marital Deduction Trust and a one-third income beneficiary of the Residuary Trust, with a remainder interest in the latter trust contingent upon his surviving until 1983 or until the death of the widow, defendant Dora A. Lynch, whichever event should last occur.

The complaint alleges that after the completion of the administration of the estate of B. A. Lynch in the year 1965, the assets thereof were transferred by the executors to the trustees for the two trusts. As a result of the transfer the Marital Deduction Trusts obtained 57.5244 per cent of the assets of the estate and the Residuary Trust the remaining 42.4756 per cent of the estate.

Paragraph 9 of the complaint states that defendant Martha Ann Lynch Porter became a successor co-trustee of the two trusts on May 17, 1968, and from that date forward acted as such co-trustee together with Mrs. Dora Lynch, the widow of the decedent. On that same day, May 17, 1968, it is alleged that one of the trustees, Martha Ann Lynch Porter, purchased on behalf of the trustees 2,200 shares of the capital stock of the Farmers & Merchants Bank and Trust Company of Blytheville from her husband, the defendant Robert A. Porter, and caused the trustees to pay $78.00 per share therefor, or a total of $171,600. It is alleged that this purchase was in violation of Mrs. Porter's fiduciary duty to the trusts and to the plaintiff as a bene-

ficiary thereof "to refrain from self-dealing." It is further alleged that the trusts borrowed certain funds from the Farmers & Merchants Bank and Trust Company to finance the stock purchase and that the trusts paid the sum of $9,599.63 as interest upon this loan from the date it was made until December 31, 1968, at which time it is alleged that the same stock was sold by Mrs. Porter, one of the trustees, for the sum of $132,000, resulting in a net loss (including the interest paid on the bank loan) of $49,199.63.

The complaint alleges that Robert A. Porter, the husband of trustee Mrs. Martha Ann Lynch Porter, participated in the latter's breach of trust and "counseled, aided and abetted her in said violation." The plaintiff alleges that he has demanded rescission of the transaction referred to above but that the defendants failed and refused to so rescind the transaction.

The prayer in count I asks for a derivative judgment on behalf of the trusts against the defendants Mr. and Mrs. Porter jointly and severally, for the sum of $49,199.63 with interest from May 17, 1968.

Count II purports to set up a separate cause of action to request the removal of the defendant Mrs. Porter as trustee by reason of her alleged violations of her fiduciary duty in making the transactions referred to above. The second count also seeks to recover the costs of the suit, including a reasonable attorney's fee. In addition to the three defendants referred to above, plaintiff's brother, Louis Lynch, is also named a party defendant with respect to the second count in the original complaint. It is alleged that Louis Lynch is a non-resident of Arkansas with Memphis, Tennessee, as his last known address. In the second count plaintiff relies upon an Order of the Chancery Court of Chickasawba District of Mississippi County, Arkansas, allegedly entered on May 17, 1968, and upon a certain "Stipulation" (copies of the Order and Stipulation being attached to the complaint) as the basis for a further prayer

that he be automatically named successor trustee in the event of Mrs. Porter's removal.

On May 25, 1970, the defendants first filed a motion to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, "for want of jurisdiction of the subject-matter of this suit, or, in the alternative to decline to exercise this jurisdiction, in deference to the previously attached jurisdiction of the Chancery Court of Mississippi County, Arkansas . . ."

The May 25, 1970, motion to dismiss has attached thereto two items: (1) a "Disclaimer" dated May 1, 1970, and signed by Mrs. Dora Lynch, Mrs. Martha Ann Lynch Porter, and Louis Lynch; and (2) a "Ratification and Confirmation" dated April 10, 1969, signed by the same three persons.

The "Disclaimer" states that those signing it disclaim any interest in this lawsuit. It goes on to state, "As far as we are concerned, this lawsuit is solely for the benefit of Bert Lynch, Jr." It further states that those signing it also executed the "Ratification and Confirmation" instrument on April 10, 1969, "in which we ratified the purchase by Robert A. Porter of the bank stock and the sale by Porter to the Lynch trusts on May 17, 1968," and "also ratified the subsequent sale of the stock by the trusts almost a year later to Robert A. Porter." The "Disclaimer" concludes: "Bert Lynch, Jr. is acting solely for himself in this litigation and not for us, the only beneficiaries of the Lynch trusts except for himself."

The instrument entitled "Ratification and Confirmation" states that the three persons signing it, "for and in consideration of the mutual benefits received and to be received by all interested persons in the testamentary trust of B. A. Lynch, deceased," agreed to ratify and confirm the matters leading up to the obtaining of the order of May 17, 1968, under which Bert Lynch, Jr., (the plaintiff herein), resigned as trustee and Martha Ann Lynch Porter (one of

the defendants herein) succeeded him. It also purports to ratify and confirm the acquisition by the defendant Robert A. Porter from the plaintiff B. A. Lynch, Jr., and his wife, of 2,200 shares of the bank's stock for $78.00 per share. The "Ratification and Confirmation" goes on to state that those signing it "understood that the actual fair market value of the stock was only $60.00 and that the $18.00 per share was being paid to B. A. Lynch, Jr., to settle a vexatious family lawsuit." The instrument further purports to ratify and confirm the immediate transfer of this stock to the Lynch trust for the same sum of money and the obtaining of loans from the bank and from Mrs. Dora Lynch to finance the purchase. Finally, the instrument purports to ratify the subsequent sale of the stock to Robert A. Porter for $60.00 a share, which is stated to be its actual fair market value. The last paragraph of the "Ratification and Confirmation" acknowledges that Bert Lynch, Jr., the plaintiff herein, was complaining about the transactions and that those signing the instrument were doing so "to express their confidence in the two trustees, Mrs. Lynch and Mrs. Porter, in the event that this transaction is ever questioned in any legal proceeding by Bert Lynch, Jr."

In their first motion to dismiss, the defendants contended that the complaint did not affirmatively show the requisite jurisdictional amount. Even though the issue is now moot, the Court states its opinion that there was no substance to that argument, even if it considered all of the matters submitted by the defendants, including the "Disclaimer" and the "Ratification and Confirmation," referred to above. It is not now necessary for the Court to set forth the analysis, reasoning, or legal authorities which formed the basis of this opinion. It is sufficient to state that the Court would have concluded on the basis of the pleadings and exhibits before it that the plaintiff had properly alleged diversity jurisdiction, seeking to recover derivatively on behalf of the trusts the full amount of any loss occasioned by the alleged self-dealing by one of the trustees together with

interest thereon. Therefore the original motion of the defendants to dismiss with respect to count I of the complaint would have been denied in the absence of the circumstances set forth in the new motion to dismiss filed October 2, 1970.

A more difficult problem is presented with respect to count II of the complaint. The jurisdiction of this Court over that cause of action can be predicated only upon the theory that it is "pendent" litigation. The Court does not agree with the plaintiff that, should he prevail upon count I, he would *automatically* be entitled to the relief sought in count II. The actions of a court in determining to replace a trustee and, if so determined, in selecting the successor trustee, are matters of judicial discretion which go beyond the merits of circumstances such as those set forth in count I or the agreements of certain interested persons. It is true that a finding of "self-dealing" would certainly be given great weight by most courts, but that finding might not be considered necessarily controlling in the light of all of the circumstances that might be present. Therefore, if this Court were to retain jurisdiction over count II, it would have to exercise the discretion which is traditionally vested in the chancery and probate courts of this state. Furthermore, if this Court should choose to replace one of the trustees, the matter would then revert to the jurisdiction of the probate court, which would have to continue the supervision of the adminisitration of the trusts. See *Urbano* v. *Bd. of Managers of the N. J. State Prison*, 415 F.2d 247, 258 n.27 (3d Cir. 1969) (dictum). It would not be wise to require that court to oversee such administration while depriving it of the power to keep, or replace, trustees. So, even if it were not necessary for the Court to dismiss count I, it would still be most reluctant to entertain count II and would not be inclined to do so unless clearly so required by law. The circumstances mentioned in the defendants' second motion to dismiss, filed October 2, 1970, make it unnecessary to decide the latter question.

The defendants' second motion to dismiss, filed October 2, 1970, renews their earlier contentions but, further, asks this Court to dismiss count I for mootness on the ground that the defendants have now paid to the trusts all sums demanded.

It appears from the record that the defendant Mrs. Dora Lynch paid to the trusts on or about October 1, 1970, the sum of $52,442.92, representing the entire amount sought to be recovered by the plaintiff under count I on behalf of the trusts, plus interest. In addition Mrs. Lynch has agreed to pay all costs adjudged in connection with count I. Although payment has been made, the defendants specifically point out that such action is not to be taken as a concession or admission that the plaintiff had a legal cause of action against any of them.

The Court finds that such payment has been made and concludes that count I has become moot and must be dismissed. See *California* v. *San Pablo & Tulare R.R.*, 149 U.S. 308 (1893). The prohibition against deciding moot cases in federal courts has, indeed, a constitutional basis under article III. See *Flast* v. *Cohen*, 392 U.S. 83, 95 and n.12 (1968); *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l* v. *Missouri*, 361 U.S. 363, 367-8 and n.7 (1960); and *Konstantinidis* v. *S.S. Tarsus*, 248 F.Supp. 280 (S.D.N.Y. 1965), *aff'd per curiam*, 354 F.2d 240 (2d Cir. 1965).

This is not, in a technical sense, a jurisdictional issue. The Court has jurisdiction of count I but must dismiss because of mootness.

What is the effect of this determination on count II?

The Court concludes that, even with the dismissal of count I for mootness, it still would have jurisdiction over "pendent" litigation and, under some circumstances, might justly proceed to determine the issues in such litigation. But not so here.

Any decision made by this Court with respect to the issues raised in count II would constitute an interference

with the administration of the trusts involved, which should be conducted under the supervision of the Chancery Court, Chickasawba District, Mississippi County, Arkansas. See Scott, Trusts, § 566 at p. 3805 (3d ed. 1967). As stated above, even if count I remained, this Court would not have considered count II unless *required* to do so under such circumstances. The Court does not believe the law would have required such a result even in that case. It is confident that such a result is not required where the federal cause of action is dismissed before trial as here. See *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726-7 (1966).

So, while this Court may still have technical jurisdiction over count II after the dismissal of count I, it concludes that it has no choice but to dismiss that claim, without prejudice, in the exercise of sound discretion.

Count II can more appropriately be decided in our state's courts; see *Odom* v. *Travelers Ins. Co.,* 174 F. Supp. 426 (W.D. Ark. 1959); *Lightfoot* v. *Hartman,* 292 F. Supp. 356 (W.D. Mo. 1968); *Northrup* v. *Browne,* 204 F. 224, 230 (8th Cir. 1913); and, therefore, it should be dismissed. See *Wham-O-Mfg. Co.* v. *Paradise Mfg. Co.,* 327 F.2d 748, 753-4 (9th Cir. 1964).

This memorandum shall constitute the Court's findings of fact and conclusions of law and shall be the basis of its Order of Dismissal entered this date.

Dated this 27th day of January, 1971.

United States District Judge

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1069

BERT A. LYNCH, JR., *Appellant,*

v.

MARTHA ANN LYNCH PORTER, ROBERT A. PORTER, LOUIS LYNCH, and MARTHA ANN LYNCH PORTER and DORA A. LYNCH, Trustees of the Marital Trust and Residuary Trust Established Under the Last Will and Testament and First Codicil Thereto of B. A. Lynch, Deceased, *Appellees.*

Appeal from the United States District Court for the Eastern District of Arkansas.

[August 3, 1971.]

Before LAY, HEANEY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

Plaintiff-beneficiary Bert A. Lynch, Jr., a citizen of the State of Missouri, initially sought relief against trustees of two testamentary trusts by bringing this diversity suit in two counts: (1) for restoration of trust funds allegedly diverted by the trustee through self-dealing,[1] and (2) for

[1] Plaintiff is an income beneficiary and contingent remainderman of two testamentary trusts created by the will of his father. A substantial portion of the assets of these trusts consists of stock in the Farmers & Merchants Bank of Blytheville, Arkansas. In settlement of an earlier suit between these parties, plaintiff agreed to sell some of his personal holdings in this bank stock to his brother-in-law, Robert Porter, for $78 a share. It was alleged that on the same day when plaintiff acquired the stock, Robert without knowledge of the plaintiff, arranged through his wife, Martha, to sell the stock to the trusts for $78 a share. Some months later Robert reacquired these shares from the trusts for $60 a share thus causing an alleged loss to the trusts of $49,199.63. Throughout these transactions Martha acted in the capacity of trustee in dealing with Robert.

removal of one of the trustees, Martha Ann Lynch Porter. In his complaint plaintiff joined Martha Ann Lynch Porter, a beneficiary and cotrustee; Robert A. Porter, her husband; Dora A. Lynch, a beneficiary and cotrustee: all citizens of the State of Arkansas, and Louis Lynch, a beneficiary, allegedly a citizen of the State of Tennessee, as individuals.[2] He also joined Martha Ann Lynch Porter and Dora A. Lynch in their capacity as trustees of the marital and residuary trusts established in the will of plaintiff's father, B. A. Lynch, deceased. After the filing of this suit the cotrustee, Dora A. Lynch, mother of both the plaintiff and the alleged wrongdoer, Martha, restored to the trusts the amount prayed for under Count I. Defendants then moved to dismiss plaintiff's complaint "for want of jurisdiction of subject matter" and "mootness." The federal district court sustained defendants' motion and plaintiff has appealed.

The federal district court ruled the first count moot, and considered the second count "pendent" to the first. Defendants urged that the district court should refuse to exercise its pendent jurisdiction over this issue in deference to the state chancery court's jurisdiction in a subsequently filed accounting suit.[3] The trial court found if it removed a trustee "the matter would then revert to the jurisdiction of the probate court, which would have to continue the supervision of the administration of the trusts." The district court observed this would require "an interference with the administration of the trusts which should be conducted under the supervision of the

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[2] Disclaimers of interest in this action and a "ratification and confirmation" of the complaint transaction were filed by Louis, Martha and Dora as the only other beneficiaries of these trusts.

[3] After restoration to the res of the funds allegedly diverted from the trust defendants filed a suit for an accounting and court approval of the trustee's action in the Chancery Court of the Chickasawba District of Mississippi County, Arkansas.

Chancery Court." In support of dismissal the trial court relied on *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966), where the Supreme Court said: "if the *federal* claims are denied before trial, even though insubstantial in a jurisdictional sense, the *state* claim should be denied as well." (Our emphasis.) Thus the trial court concluded it had "no choice" but to dismiss plaintiff's suit.

The sole issue on appeal is whether the trial court was correct in treating Count II, seeking removal of the trustee, as a pendent claim and refusing to retain jurisdiction of this matter as an exercise of sound discretion.

Pendent jurisdiction in a *diversity action* attaches to a claim when that claim, lacking in independent jurisdictional requirements, cannot be aggregated with the other claims in the suit. However, the trial court may find that the ancillary claim is so closely related to the subject matter being adjudicated that considerations of judicial economy and fairness to the litigants require assumption of jurisdiction. *Hatridge* v. *Aetna Casualty & Surety Co.,* 415 F.2d 809 (8 Cir. 1969). In such cases aggregation is usually not possible because there is a distinctness of claims and a difference of parties—i.e., one plaintiff suing in two capacities, or a single plaintiff asserting separate and distinct claims against two or more defendants, or two related plaintiffs seeking separate relief from integrated claims against the same defendant. Cf. *Borror* v. *Sharon Steel Company,* 327 F.2d 165 (3 Cir. 1964); *Wilson* v. *American Chain & Cable Company,* 364 F.2d 558 (3 Cir. 1966); *Jacobson* v. *Atlantic City Hospital,* 392 F.2d 149 (3 Cir. 1968).

Undeniably, the trial court had jurisdiction over Count I.[4] Federal jurisdiction was based on diversity of citizen-

[4] There exists no defect of parties. All beneficiaries are normally deemed indispensable parties to an equitable suit seeking restoration of the res. 3 Moore Fed. Prac., ¶ 19.18(1), at p. 2564

ship and the alleged amount in controversy exceeded $10,000. In this count plaintiff prayed for the relief of restoration of trust funds "derivatively on behalf of the trust." Thus, the apparent capacity in which plaintiff seeks this relief differs from that in Count II where plaintiff sues on his own behalf as beneficiary of the trust. Apparently, it is this assumed dual-capacity which induced both the trial court and the plaintiff to believe that these claims cannot be aggregated and, as a consequence, that Count II must be "pendent." The form of the pleading was misleading. Plaintiff's allegations that the claim for damages is "derivative" misconstrues the nature of the right he seeks to enforce.[5] And since this issue relates to the basic jurisdiction of the federal court, it is incumbent on this court to ascertain the correctness of the jurisdictional ruling. See *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *Roberson* v. *Harris*, 393 F.2d 123 (8 Cir.

(2d ed. 1970). However, where a disclaimer of interest is filed by a beneficiary, he becomes an unnecessary party. 3 Moore, supra, ¶ 19.03, p. 2157, citing *Grant County Deposit Bank* v. *McCampbell*, 194 F.2d 469 (6 Cir. 1952). Nevertheless, we deem Louis Lynch's joinder as a party defendant to the suit proper. His attitude toward the litigation as manifested by his disclaimer dictates his proper alignment as a party defendant. See *Green* v. *Green*, 218 F.2d 130 (7 Cir. 1955). Cf. *Brown* v. *Denver Ominbus & Cab Co.*, 254 Fed. 560 (8 Cir. 1918).

Count I was originally attacked as being deficient in jurisdictional amount on the theory that plaintiff's distributive share of the trust res involved was less than $10,000. Cf. *Sawyer* v. *Davis*, 408 F.2d 358 (8 Cir. 1969). The trial court properly ruled that jurisdictional amount had been established. Although plaintiff sues individually he nevertheless seeks to enforce a right commonly held by all beneficiaries to obtain restoration to the trust of the full loss.

Under Count II all beneficiaries need not be joined in a suit to remove a trustee. See *Wesson* v. *Crane*, 165 F.2d 6, (8 Cir. 1948).

[5] Substance of the pleadings should control. See *Richardson* v. *Communications Workers of America*, AFL-CIO, No. 20,236 (8 Cir. June 4, 1971).

1968); *Texaco-Cities Service Pipe Line Co.* v. *Aetna Casualty & Surety Co.*, 283 F.2d 144 (8 Cir. 1960); *Schroeder* v. *Freeland*, 188 F.2d 517 (8 Cir. 1951).

It is a recognized principle of law that a suit for restoration of the trust res from a trustee seeks enforcement of a right belonging only to the beneficiary. Restatement Trusts 2d § 200. When such a breach of trust occurs it must be redressed by the beneficiary who may sue the trustee for restoration and also seek the latter's removal. See, Restatement, Trusts 2d §§ 199 and 201. By contrast, a derivative suit involves the enforcement of a right of action which belongs to another. Wright, Fed. Courts § 73 (1970); Moore, supra ¶ 23.1.16(1). Thus if the trust res were harmed by a third party, and the trustee refused to act, a derivative action would lie against the wrongdoer by the beneficiary on behalf of the trust. See Scott, Trusts, § 282.1 (3d ed. 1967).

Here, the injury to the res was caused by the trustee, thus the claim for breach of trust belongs solely to the beneficiary and not to the trust.[6] The action is therefore not derivative. Consequently, the claim for relief in Count I is of the same equitable nature as the beneficiary's suit to remove the trustee. Thus we conclude that plaintiff was not suing in different capacities and that Count II was not pendent.

It is a well settled rule that once diversity jurisdiction is properly invoked, a single plaintiff may properly aggregate all of the claims which he has against the defendants

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[6] While it is true that Robert A. Porter is a third party and not a trustee or beneficiary, he is alleged to have "counseled, aided and abetted" Martha in the violation of her fiduciary duty. In such an instance, the primary right of action against the third party belongs to the beneficiary even though the trustee may also sue. Scott, Trusts, § 282.1, p. 2338 (3d ed. 1967).

to satisfy the jurisdictional amount.[7] *Edwards* v. *Bates County*, 163 U.S. 269 (1896); *Simecek* v. *United States National Bank of Omaha*, 91 F.2d 214 (8 Cir. 1937); *Alberty* v. *Western Surety Co.*, 249 F.2d 537 (10 Cir. 1957); *Potter's Photographic Applications Co.* v. *Ealing Corp.*, 292 F.Supp. 92 (E.D.N.Y. 1968). And, of course, subsequent events reducing the amount in controversy will not affect the jurisdiction of the court. *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938); *State Farm Mutual Automobile Ins. Co.* v. *American Casualty Co.*, 433 F.2d 1007 (8 Cir. 1970); *United States Fidelity & Guaranty Co.* v. *Millers Mutual Fire Ins. Co. of Texas*, 396 F.2d 569 (8 Cir. 1968); *Home Ins. Co. of N.Y.* v. *Trotter*, 130 F.2d 800 (8 Cir. 1942).

Once claims have been properly aggregated and original jurisdiction has attached, dismissal of one claim does not leave those remaining, although for less than the jurisdictional amount, under the pendent jurisdiction of the court. The remaining claim stays within the court's original diversity jurisdiction. See e.g., *State Farm Mutual Auto Ins. Co.* v. *American Casualty Co.*, 433 F.2d 1007 (8 Cir. 1970); *Stewart* v. *Shanahan*, 277 F.2d 233 (8 Cir. 1960); *Birkins* v. *Seaboard Service*, 96 F.Supp. 245 (D.N.J. 1950).

Assuming federal jurisdiction arguendo, defendants additionally urge that the district court should nevertheless abstain from passing on the claim relating to removal of

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[7] See especially *Stone* v. *Stone*, 405 F.2d 94 (4 Cir. 1968) where a settlor sued a trust beneficiary and the mother of the beneficiary for misappropriation of trust corpus. In the first count the settlor sought $8,321.05 from the mother for unlawful diversion of the corpus (shares of stock), and in the second count the settlor charged the beneficiary with wrongful refusal to endorse the stock certificates which had a value of $5,583.00. The beneficiary's mother was named as a co-defendant in the second count based on an allegation of aiding and abetting the beneficiary's tortious conduct. Jurisdictional amount was satisfied by aggregating the two claims against the mother.

the trustee. The defendants' reasoning, as adopted by the district court, is that the question of removal involves application of state law and abstention will avoid any undue interference with the state court's jurisdiction over the res of the trust. This reasoning misconstrues the doctrine of abstention. Simply because the question before the court involves state law does not require abstention of a federal court. As stated by the Supreme Court in *Meredith* v. *Winter Haven,* 320 U.S. 228, 236 (1943): "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine." See also, *Baggett* v. *Bullitt,* 377 U.S. 360, 375 (1964); *McNeese* v. *Board of Education,* 373 U.S. 668, 673, n. 5 (1963); *Allegheny County* v. *Mashuda Co.,* 360 U.S. 185, 196 (1959); *Propper* v. *Clark,* 337 U.S. 472, 490 (1949). Here there exists no problem of construction or interpretation of a state statute or constitutional principle. There is no alleged uncertainty or ambiguity of state law, nor does any appear to exist. The state court had no custody of the res at the time suit was filed. Once the executors closed the testator's estate and delivered the res to the trustees, the probate court's jurisdiction terminated. There exists no continuing administration of the trust in the courts of Arkansas.[8] The

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[8] See *Thompson* v. *Dunlap,* 424 S.W.2d 360, 224 Ark. 178 (1968), which states: "Judicial supervision of a trust unavoidably involves added expense in court costs and attorney's fees. In the absence of a direction by the creator of the trust that it be so supervised and of any peculiar facts suggesting the desirability of such judicial scrutiny, we are of the opinion that the issue (of continuing administration) should not be raised by the court on its own motion."

In the instant case the testator provided in the trust instrument, "they (the trustees) shall not be required to file reports with any court." See *Hastings* v. *Jackson,* 148 S.W.2d 305 (Ark. 1941), for the effect of such a clause on the duty to account.

argument that any federal action will interfere with the state court's administration of the trust is illusory. The state suit was filed subsequent to the institution of this action. Our analysis does not disagree with the district court's apt appraisal and preference to have the state Chancery Court administer the accounting. However, state courts have only concurrent jurisdiction in matters such as these, and preference of the district court alone, cannot defeat federal jurisdiction once properly invoked. As stated in *Meredith*, supra, "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. . . . [I]t has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked to decide questions of state law whenever necessary to the rendition of a judgment." 320 U.S. at 234. See also *Martz* v. *Braun*, 266 F.Supp. 134 (E.D. Pa. 1967), holding in a case similar to the one at bar that it would be an abuse of discretion to abstain on the basis of federal-state comity.

We find that the district court erred in declining to retain jurisdiction of plaintiff's remaining claim for relief seeking removal of the trustee. The court may entertain a motion, *if deemed necessary*, to protect its jurisdiction since federal jurisdiction over the subject matter was initially and properly invoked. *Princess Lida* v. *Thompson*, 305 U.S. 456 (1939).

Judgment reversed and the cause remanded for further proceedings in accord with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

No. 71-1069

BERT A. LYNCH, JR., *Appellant,*

v.

MARTHA ANN LYNCH PORTER, ROBERT A. PORTER, LOUIS LYNCH, DORA A. LYNCH, MARTHA ANN LYNCH PORTER AND DORA LYNCH, Trustees of the Marital Trust and Residuary Trust established under the Last Will and Testament and First Codicil thereto of B. A. Lynch, deceased, *Appellees.*

This Cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby, reversed.

And it is further ordered that this cause be remanded for further proceedings in accord with this opinion of this Court this day filed herein.

August 3, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-578

MARTHA ANN LYNCH PORTER, et al.,
Petitioners,

v.

BERT A. LYNCH, JR.,
Respondent.

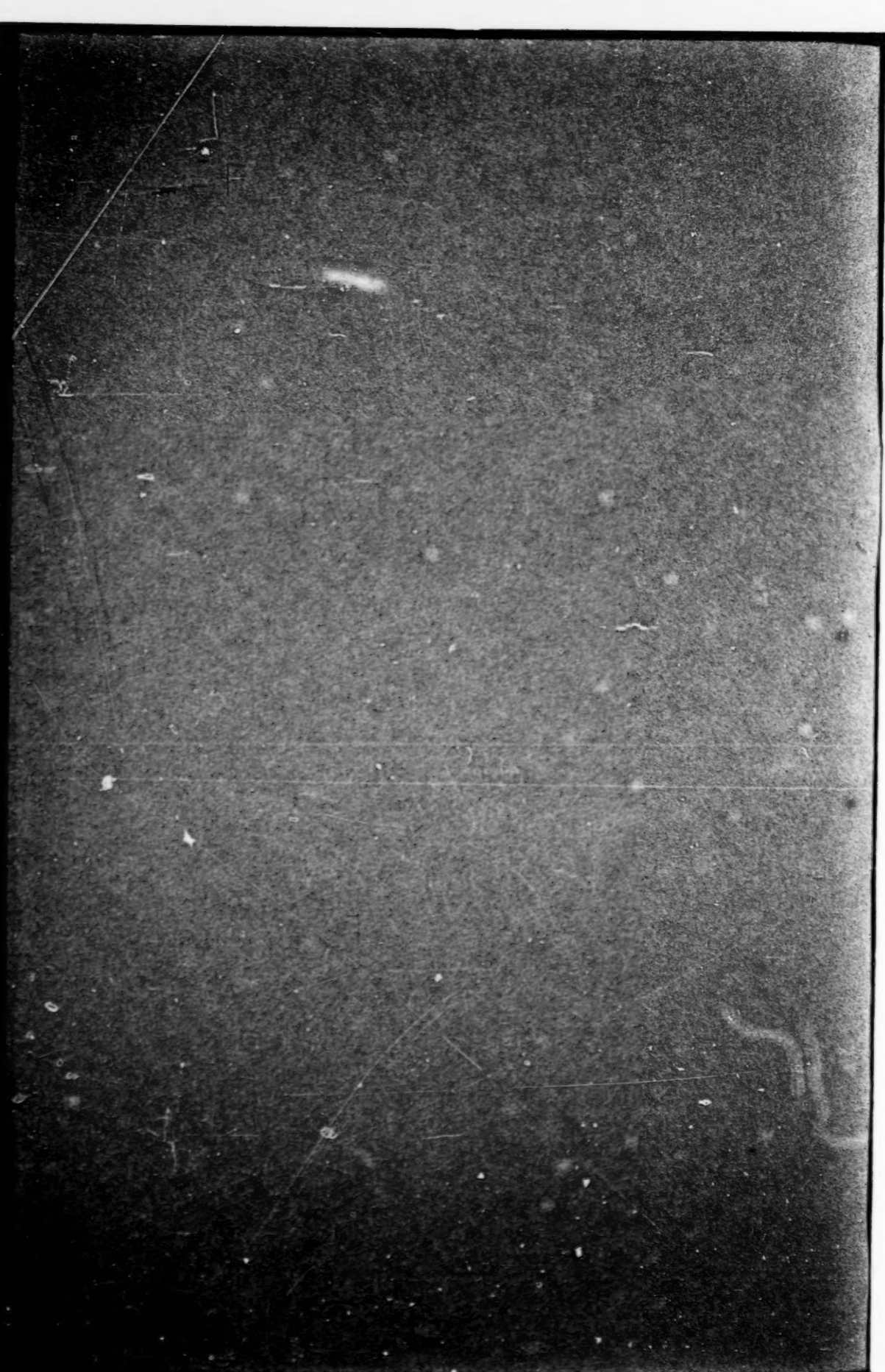
On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit filed August 3, 1971, is reported at 446 F. 2d 225.

QUESTIONS PRESENTED

May a federal district court in a diversity case "abstain" from deciding one of the plaintiff's properly joined claims merely because the defendants have attempted to

"moot" the issue of damages by making restitution, where the defendants are vigorously seeking to litigate the very same claim in their subsequently filed state court action?

STATEMENT OF THE CASE

Petitioners' Statement of the Case is inadequate to recite accurately the strange facts which generated the questions presented by this case or to disclose the intensity or ingenuity of petitioners' efforts to evade the processes of the federal courts.

Respondent Bert Lynch, Jr. (hereinafter sometimes referred to as "Lynch") is a resident and citizen of St. Louis, Missouri and a beneficiary of his deceased father's two testamentary trusts. Petitioners are all citizens of states other than Missouri; Martha Porter, Lynch's sister, and Dora Lynch, his mother, are trustees of those two trusts. Martha Porter and her husband, Robert, as well as Dora Lynch, all live in Blytheville, Arkansas.

Lynch, as beneficiary, instituted this action on April 13, 1970, against his sister, Martha Porter, and her husband, Robert Porter, to rectify a wrong perpetrated upon him and the other beneficiaries of the trusts by his sister's clandestine self-dealing with her husband in trust assets. All beneficiaries were joined as necessary parties defendant.

The basic facts which precipitated this action are these: In 1968, while Lynch and his mother were serving as trustees of the trusts, a dispute developed between the Porters and Lynch concerning the proper policies to be followed in the management of the trust assets. Martha Porter then sued her brother in the Arkansas Chancery Court at Blytheville, seeking to break the deadlock and to have Lynch removed as a trustee. In order to buy his peace and to avoid further family acrimony, Lynch re-

signed as a trustee and consented to the appointment of his sister in his stead. As a part of this settlement of that lawsuit, Lynch agreed to sell his stock in the Farmers and Merchants Bank of Blytheville to his sister's husband, Robert Porter, then as now the bank's Board Chairman. The Chancellor at Blytheville approved this settlement, the terms of which were embodied in an order and stipulation dated May 17, 1968, which concluded with a decree reciting that:

> "Nothing further remains to be done in this litigation and it will be for the best interests of all parties if the cause be considered closed and fully terminated after this order is filed. All parties who have signed this stipulation will be bound by this order."

On the *very day* on which Robert Porter acquired the bank stock from Lynch pursuant to the settlement agreement, Porter, unbeknownst to Lynch, immediately turned to his wife Martha, as the newly appointed trustee of the Lynch family trusts, and sold what had formerly been Lynch's stock to the trusts, at a price of $78.00 per share, the same price at which he had just acquired it from Lynch. Some few months later these same shares were resold by the trusts to Mr. Porter; only this time the price was reduced to $60.00 per share, thereby permitting Mr. Porter and his wife to reap an $18.00 profit on each of the 2,200 shares sold, a profit which was in part funded by Lynch as a beneficiary of the trusts.

When Lynch ultimately learned of these machinations, he filed this diversity suit on April 13, 1970, in federal court in Jonesboro, Arkansas. In Count I, Lynch requested, on behalf of the trusts, a judgment against Martha Porter and Robert A. Porter jointly and severally in the amount of $49,199.63, plus interest. and such other and further relief as the court might deem proper. In Count II, he prayed for removal of petitioner Martha Porter as a trustee of the trusts because of her violations of her fiduciary

duties to the trusts. The second count also requested that Lynch be appointed successor trustee and that he recover his costs, an attorneys' fee and such other and further relief as might be appropriate.

As part of their initial effort to defeat federal jurisdiction, petitioners Dora Lynch, Martha Porter and Louis Lynch, the other beneficiaries of the trusts, filed a "disclaimer" of any interest in the lawsuit and a "ratification and confirmation" of the actions of Martha Porter and her husband, Robert A. Porter, which were the subject of the complaint. In their first Motion to Dismiss, petitioners contended that since the pro-rata recovery claimed for that portion of the trusts held for the benefit of respondent was less than $10,000, the district court did not have jurisdiction. No ruling was made at that time on petitioners' motion, but the district court later, in its Memorandum Opinion, properly concluded that the motion was without merit.

On June 24, 1970, *several months after respondent had filed this action in the district court*, petitioners instituted a new suit in the Chancery Court for the Chickasawba District of Mississippi County, Arkansas, at Blytheville, requesting approval of their trust accountings and a declaratory judgment confirming and ratifying all actions of the trustees since 1968, including those transactions which form the subject matter of this case. Pursuant to an order of that court, Lynch has filed exceptions to the accountings.*

On or about September 30, 1970, while the federal court case was still not at issue, Dora A. Lynch, respondent's mother, who was not charged with any wrongdoing

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* There is no requirement under Arkansas law that trustees account to any court for their administration; moreover, the testator specifically exempted his trustees from any duty to account.

and against whom no monetary relief was sought, made a payment of $52,442.92 to the trusts, representing, according to her calculations, the total amount of recompense sought for the trusts by respondent from petitioners Martha and Robert Porter as a result of their self-dealing and breach of fiduciary duties.

Petitioners then filed a "Motion to Dismiss for Want of Jurisdiction of Subject Matter and on Ground of Mootness," contending that since the amount of money alleged to have been wrongfully appropriated by Martha Porter and her husband had been presumably restored to the trusts, there was no longer any subject-matter jurisdiction under Count I, and Count I was therefore moot. Petitioners further asserted that if Count I was moot, Count II, which was denominated a "pendent" claim seeking attorneys' fees and removal of Martha Porter because of her wrongdoing, must also be dismissed.

Over the strenuous objections of respondent, the district court sustained the Motion to Dismiss on the grounds that the case was moot. The court dismissed Count II without prejudice, reasoning that since the jurisdictional predicate for the case—Count I—was removed, it had "no choice" but to dismiss Count II also.

Lynch appealed the district court's dismissal order to the United States Court of Appeals for the Eighth Circuit, which reversed the dismissal of Count II and remanded that portion of the case to the district court for further proceedings. The Court of Appeals held that since the diversity jurisdiction of the federal court had been properly invoked, respondent could properly aggregate all claims which he had, and the dismissal of one claim does not require or permit dismissal of others even though the others would not, if sued on alone, contain all the necessary jurisdictional elements.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There is no dispute about the fact that the district court's diversity jurisdiction was properly invoked at the outset of the case. Plaintiff Lynch sought recovery in the amount of almost $50,000.00 from the Porters in Count I. Thus, under Rule 18(a), the plaintiff was entitled to aggregate all the claims he had against the defendants and was entitled to a judgment responding to his allegations. The claims of Count II, therefore, were not "pendent," although inaccurately so designated by plaintiff. There was no "federal" claim to which a "state" claim was appended, and petitioners do not now appear to contend that there was any issue of "pendent" jurisdiction in this case.

The issues before the Eighth Circuit were spawned by the petitioners' persistent and resourceful efforts to deprive respondent of his choice of forum. It is unlikely that the decision of the Eighth Circuit in this case will be of general interest because it is confined to its own facts, and it is atypical for a defendant to pay voluntarily the entire amount of plaintiff's prayer on a non-negotiated basis, without obtaining a release or a stipulation for dismissal. Stated otherwise, most cases involving comparable facts would dispose of all issues at once, either by way of settlement or judgment. Here, however, the defendants have sought to settle unilaterally one claim and thereby deprive plaintiff of a right to litigate the other claims in the forum of his preference.

Moreover, any result other than that reached by the Court of Appeals would be an open invitation to federal court defendants to subvert federal jurisdiction by all sorts of devious schemes and would encourage forum

shopping of the type engaged in by petitioners here. Obviously, the sole purpose of the payment made by Mrs. Lynch was to attempt to oust the federal court of jurisdiction, and the later-filed state court action was intended to usurp the adjudicative authority previously conferred on the federal tribunal.

Petitioners cannot and do not contend that the district court could have abstained from the outset and refused to entertain any of respondent's claims. Certainly a federal court is fully competent to redress fiduciary abuses, whether they arise in a corporate or in an express-trust context. But petitioners contend that when Count I was removed from the case, the court then had discretion to dismiss Count II. This is incorrect, for once diversity jurisdiction attaches, it is not lost by subsequent events which reduce or eliminate the amount in controversy, and the plaintiff is entitled to an adjudication of all of his claims. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938); *State Farm Mutual Insurance Company v. American Casualty Company*, 433 F. 2d 1007 (8th Cir. 1970); *Stewart v. Shanahan*, 277 F. 2d 233 (8th Cir. 1960).

The present case does not contain any elements of a conflict between federal and state courts or interference by the federal court with the operations, judgments, or powers of the state court. Neither is there any troublesome threshold state law question, the resolution of which might obviate the necessity of confronting constitutional problems. It is true that Martha Porter, the trustee whom plaintiff is seeking to remove, was appointed as a result of a compromise of prior state court litigation, but that litigation had terminated two years before the filing of the instant action.

Most diversity cases will necessarily contain some state law questions which will require adjudication by federal

judges. This is a natural result of the Congressional directive that a non-resident shall have the option to litigate in federal court rather than in the local courts, which may be more subject to parochial prejudices and politics. In *Markham v. Allen*, 326 U.S. 490, 495 (1946) this Court held that:

> "The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner."

The Court in *Markham* acknowledged that although a federal court has no jurisdiction to probate a will or administer an estate, it does have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" so long as the federal court does not interfere with the probate proceedings or disturb or affect the possession of property already in the custody of a state court.

Here, the probate estate had long since been closed, and the Court of Appeals properly observed that:

> "The state court had no custody of the *res* at the time suit was filed. Once the executors closed the testator's estate and delivered the *res* to the trustees, the probate court's jurisdiction terminated."

The questions remaining for resolution by the district court are rather simple ones—whether the trustee should be removed and whether plaintiff is entitled to attorneys' fees from the trust for his role in recovering trust assets. These are neither difficult nor unresolved legal issues and are not dependent upon the interpretation or construction of any Arkansas statute. They are, rather, addressed to the court's inherent equity jurisdiction. Thus it is manifest that the court has the duty to adjudicate

these claims, particularly where, as here, the failure to do so would unconscionably sanction and reward petitioners' forum-shopping scheme.

The requirement that a federal court must decide a case properly presented to it is subject to very few exceptions, none of which are present in the instant case. In *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 188-89 (1959), this Court said:

> "The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. Since no exceptional circumstances justifying abstention appear in this case we think that the Court of Appeals was correct in holding that the district court should have adjudicated the respondent's claim."

Even where the state law questions are difficult, this Court has refused to permit abstention. In *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943) the Court stated as follows:

> "But we are of the opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their con-

venience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment . . ."

The principal case relied upon by petitioners, *United States v. Bank of New York Co.*, 296 U.S. 463 (1936) is inapposite to the instant situation since (a) it was not a diversity case and (b) the property to which the United States was making claim was already under the possession and control of the state court. As a matter of fact, the Court there set forth the rule which was correctly applied by the Eighth Circuit here, *i.e.*, that in a *qu si-in-rem* case, including one to "administer trusts," the court first acquiring jurisdiction—whether state or federal—exercises it to the exclusion of all others. See also *Princess Lida v. Thompson*, 305 U.S. 456 (1939).

The decision of the Eighth Circuit below, in addition to being circumscribed by its own facts, is completely in harmony with the teachings of this Court. There is no actual or threatened disruption of state-federal relations, and review of this family dispute by this Court would serve no generally useful purpose.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

.....

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.....

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